BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RODGER D. RABBASS Claimant	)	
VS.	)	
ROBINSON'S DELIVERY SERVICES, INC. Respondent	)	Docket No. 1,030,070
AND	)	
AMERICAN INTERSTATE INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 6, 2008, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on February 3, 2009. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Kevin J. Kruse, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant sustained an accident that arose out of and in the course of his employment with respondent and that claimant gave timely notice of his accident. Further, the ALJ found that claimant suffered an intervening injury. The ALJ found that claimant was not permanently totally disabled as a result of his work injury. The ALJ also concluded that the record did not show that claimant had any functional impairment from the injury suffered in this case. Although the ALJ found that claimant was entitled to a work disability, he found that claimant had a 0 percent task loss, finding that claimant had not proved a rational basis upon which to compute a percentage of task loss because the physicians did not give consistent opinions about how claimant's employment abilities were affected by his work-related injury, claimant had an intervening injury, and the task lists prepared by the vocational rehabilitation experts were not accurate. The ALJ also concluded that claimant did not make any effort to find post-injury employment and imputed a wage to the claimant that resulted in a percentage of wage loss of 28 percent. Accordingly, the ALJ concluded that claimant had a work disability of 14

percent. The ALJ found that claimant had a 5 percent preexisting functional impairment and subtracted that from the 14 percent work disability, resulting in an award of 9 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's finding that he is not permanently totally disabled as per the opinion of Dr. P. Brent Koprivica. In the alternative, claimant requests he be awarded a work disability in the amount of 90 percent. In support of this request, he argues that he is permanently and totally disabled and does not possess the ability to earn a wage. He also contends that the ALJ erred in relying upon Terry Cordray's opinion to establish an imputed wage. Further, claimant argues that the Kansas Court of Appeals appears prepared to overrule the judicially created requirement for a post injury good faith job search. Relative to the ALJ's finding that claimant had not proven any percentage of task loss, he contends that if the ALJ had found that the task lists included tasks he had not performed in the 15-year period before his injury, a task loss percentage could be determined by eliminating any irrelevant tasks from the calculation. In conclusion, claimant requests that the Board find that he is permanently totally disabled or, in the alternative, asks that the Board find he is entitled to a 90 percent work disability based on a 100 percent wage loss and an 80 percent task loss.

Respondent argues that claimant did not suffer an injury that arose out of and in the course of his employment and that, instead, claimant's current condition is due to the natural aging process. Further, respondent contends that claimant injuries were due to a subsequent intervening event that occurred at his home and not from his work activities. In the event the Board finds that claimant suffered an injury that arose out of and in the course of his employment, respondent requests that the Board affirm the ALJ's finding that claimant is not permanently totally disabled. Respondent further requests that the Board find that claimant is not entitled to a work disability because he did not exhibit good faith in that he did not seek accommodated employment with respondent, nor did he make any effort to find employment elsewhere. Respondent requests that if the Board finds this claim compensable, claimant be limited to an award for functional impairment in the amount of 5 percent at most as per the opinions of Dr. Koprivica and Dr. Zarr.

The issues for the Board's review are:

(1) Did claimant suffer an injury that arose out of and in the course of his employment with respondent?

(2) Did claimant sustain an intervening accident?

(3) Is claimant permanently and totally disabled?

(4) If claimant is not permanently and totally disabled, what is the nature and extent of his disability?

(5) Is respondent entitled to a credit for preexisting impairment? If so, what is the percentage of claimant's preexisting impairment?

FINDINGS OF FACT

Claimant was 60 years old at the time of the regular hearing. He has a number of health problems including degenerative joint disease; diabetes mellitus; morbid obesity; heart problems, including a heart attack in 2003; high blood pressure; atrial fibrillation; shortness of breath; Bell's palsy; and sleep apnea. He had a cervical fusion at C4-5 in 1976 and right knee surgery in 1978.

Claimant left high school after the 11th grade and then served in the Army. While in the Army, he studied and took the test for a GED but was not notified that he passed the test. He was discharged from the Army in 1969, after which he worked at Vulcraft Nucor Corporation (Vulcraft) as a welder. He suffered work-related injuries to his low back while working for Vulcraft on December 2, 1989, and again in January 1990. As a result, he was off work for a period of time. He was ultimately released from medical care with permanent work restrictions of no lifting greater than 50 pounds and no frequent or continuous bending or twisting. Vulcraft was unable to accommodate those restrictions. There is conflicting testimony about when he last worked for Vulcraft and how long he was without work before he was employed at his next job. At the regular hearing, claimant testified that he last worked at Vulcraft in 1993 and was off work two years before finding another job. Later in his regular hearing testimony, he said he did not return to work for Vulcraft after his injury in January 1990 and was off work almost five years. Mary Titterington's report indicates claimant told her he worked at Vulcraft from 1969 to 1993 and then was off work until 1995. He told Terry Cordray that he was off work for one or two months after a back injury in January 1990 and for one year after a back injury in either 1992 or 1993. Claimant's employment application for respondent contains a work history which lists his employment at Vulcraft as ending August 1991.[1] This would be within 15 years of the claimant's date of accident.

In 1995, claimant obtained a job at Battle Creek Farmers Co-op. He obtained a CDL and began driving a truck, driving only short distances as he could not stand to drive long distances. He was required to load and unload trailers. He testified that in 1995, he had back pain, but it was not as bad as before and he learned to work with it.

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[1] Robinson Depo., Ex. 1.

Claimant began working for respondent in 1998. He testified that as part of his job he drove a van, a straight truck, and a tractor trailer. He had two previous work-related accidents while working for respondent, one on August 20, 2004, when he was lifting some bottled water, and another in January 2005 when he slipped on some snow and fell. Both of those injuries were to his low back. Claimant testified that he improved after those two accidents but did not believe he got back to the way his back was before.

In January 2006, claimant was driving a hostling buggy. There were not a lot of springs in the buggy, and it bounced. On Tuesday, January 31, he noticed pain in his low back and both legs. This back pain was a lot worse than his previous back problems. Nevertheless, he continued to work his entire shift. When he went home, he took some Tylenol and had his wife rub Biofreeze on his back. He continued to work full time driving the hostling buggy the rest of the week, and by the end of the week, his back pain had gotten worse.

Claimant's wife testified that when he woke up on Saturday, February 4, he was having back pain. He could not tie his shoe laces, and she had to tie them for him. Claimant, however, went into his backyard to supervise his son in some yard work. His back was already hurting, but he was able to walk. He told his son what he wanted done and then turned around to go back up some steps to the patio, and he could not go up the steps. He did not slip, fall, or twist his back. His son and wife helped get him back into the house. On Sunday morning, claimant's wife called their primary care physician, and the on-call doctor prescribed some pain medication. Claimant testified the medication did not help.

On February 6, 2006, claimant saw Dr. Christine Sankpill, his personal physician. He complained to Dr. Sankpill that he had low back pain that started seven days earlier. He related it to bouncing around in a buggy all week. Dr. Sankpill changed his pain medication and gave him an off-work slip. Claimant followed up with Dr. Sankpill on February 9 and again on February 13, at which time she recommended that he speak with respondent about FMLA. However, when claimant spoke with Terry Robinson, one of respondent's owners, he reported the injury as work-related. Respondent referred him to Dr. Legler, who he first saw on February 23, 2006. Dr. Sankpill had already started claimant in physical therapy, and Dr. Legler continued that therapy and also scheduled him for an MRI, which showed claimant had advanced degenerative disc disease at L5-S1 and mild loss of disc signal intensity at L3-4. After getting the results of the MRI, Dr. Legler referred claimant to Dr. David Ebelke. Claimant was first seen by Dr. Ebelke on April 3, 2006.

Dr. Ebelke stated that all the degenerative changes revealed on the MRI were age related. He further testified that there were no acute findings on the MRI, and it did not show anything that could be related to claimant's work injury. After examining claimant, Dr. Ebelke diagnosed claimant with a lumbar strain/overuse syndrome. He opined that claimant's low back pain was not unexpected given his age, weight, type of work, and the

degenerative changes. He did not believe claimant had any evidence of a permanent injury and did not believe there was any work-related reason claimant could not return to work. Instead, he believed that claimant's problems were related to his morbid obesity, the fact that he was a nicotine abuser, and his age-related degenerative changes. His report indicates that he told claimant that if he did not believe he could perform his job, he would refer him to a physiatrist for a functional capacity examination. Claimant was then referred to Dr. James Zarr.

Dr. Ebelke stated that in accordance with the AMA *Guides*,[2] claimant would have no impairment because of the work-related accident. He said that claimant does have pathology that could place him in the DRE lumbosacral Category II, but the degenerative changes were all preexisting. In his opinion, claimant had a 0 percent impairment from this accident. Dr. Ebelke said that claimant had subjective complaints of pain but no evidence of work-related reasons for the pain. He has some overuse syndrome because of his job. He is morbidly obese and has degenerative problems with his back. Therefore, he probably should not be in his occupation. Dr. Ebelke testified that truck drivers are known to have more back pain complaints and injuries than the general population partly because they sit much of the time without exercising. However, Dr. Ebelke stated: "It would be to me fraudulent to recommend disability or impairment based on a minor increase in pain with doing the job."[3]

Dr. James Zarr is board certified in general medical practice with a specialty certification in the field of physical medicine and rehabilitation and electrodiagnostic medicine. He first examined and treated claimant on April 25, 2006. On Dr. Zarr's patient information sheet, claimant indicated he was a delivery driver and said he was riding in a buggy that bounced around and as a result he developed low back pain. Claimant did not tell Dr. Zarr about his low back injuries in 1989 and 1990, nor did he report that he had permanent work restrictions as a result of those previous injuries. Claimant also did not report any intervening accident.

After examining claimant, Dr. Zarr diagnosed him with persistent low back pain. Since claimant had been in physical therapy for 10 weeks, he advanced him to work hardening and continued his medical leave of absence from work. Dr. Zarr testified that claimant made progress in the work hardening sessions, his pain complaints decreased, and he had improved mobility in both his low back and lower extremities. Dr. Zarr agreed that the therapist for claimant's work hardening indicated that he was not meeting the demands of his employment as of May 19, 2006. Nevertheless, on May 22, 2006, Dr. Zarr released claimant to full-time regular duty without restrictions, which he said was medically

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Ebelke Depo. at 30.

appropriate and reasonable as claimant's examination showed subjective complaints with no objective findings.

Dr. Zarr did not think the nature of a truck driving position would result in or have the potential to aggravate or cause claimant's condition to worsen or be persistent. He testified that driving a truck might increase claimant's pain, but it would not damage his body. He further testified that there is no indication that claimant is a surgical candidate, and therefore he needs to just endure the pain and work without restrictions. Based on the AMA *Guides*, Dr. Zarr rated claimant as being in DRE Category II, which computes to a permanent partial impairment of 5 percent to the whole body.

Dr. Zarr found claimant's testimony about the events in his yard on February 4, 2006, to be significant in that those events increased his back pain. Before the events of February 4, 2006, claimant was able to do his normal, regular job duties. After February 4, 2006, he was taken off work. Dr. Zarr believes the Saturday, February 4, 2006, event was a subsequent intervening accident. In making this statement, however, Dr. Zarr was not aware that when claimant woke up the morning of February 4, he was having significant back pain and that his wife had to put his shoes on for him.

After being released by Dr. Zarr, claimant, on his own, saw Dr. Clifford Gall, a neurosurgeon, on June 15, 2006. He complained of back and right-sided leg pain and weakness in his left leg. Dr. Gall did not know what was causing claimant's symptoms and ordered additional testing. A CT scan of his lumbar spine showed severe disc degeneration at L5-S1 with mild retrolisthesis of L5 on S1 but no evidence of spinal stenosis or disc herniation. A lumbar myelogram was negative for spinal stenosis or ventral extradural defects. A nerve conduction study found no evidence of lumbar radiculopathy. Dr. Gall saw claimant again on June 27, 2006, with his only recommendations being physical therapy, a lumbar brace, or possibly epidural steroid injections, although those would be difficult because of claimant's size.

Claimant saw no other medical provider for his back condition until he was sent to Dr. P. Brent Koprivica at the request of his attorney. Dr. Koprivica is board certified in emergency medicine and occupational medicine. He examined claimant on October 8, 2007. At that time, claimant was having complaints of back pain with symptoms into his legs that he attributed to bending and lifting tasks he performed at respondent, as well as hostling activities where he was jarred. Claimant also told Dr. Koprivica that on Saturday, February 4, 2006, he was unable to walk back into his house from his yard because of pain. Claimant told Dr. Koprivica that he was symptomatic before he went out into the yard and then had an episode of pain and needed help to get back in the house. Dr. Koprivica read claimant's testimony where he said he had not twisted or lifted or done anything to hurt himself in his yard. Accordingly, Dr. Koprivica believes that claimant's symptoms were a direct and natural consequence of the repetitive injury he sustained at work and was not a new event.

Dr. Koprivica reviewed claimant's medical records and noted that he had been treated conservatively with physical therapy, medication, and a work-hardening program. He had an MRI done. He noted that on May 19, 2006, it was the opinion of the therapist in the work hardening program that claimant did not meet the physical requirements of his work. Dr. Koprivica said that Dr. Zarr's release of claimant to full duty was inconsistent with the therapy record.

Claimant complained to Dr. Koprivica of severe, constant back pain. He said he was limited posturally because of the severity of the pain. He could sit less than 45 minutes as a maximum. He could stand less than 30 minutes, and he could walk less than 10 minutes. Claimant told Dr. Koprivica that he self-limited himself to lifting less than 20 pounds because he was afraid he would hurt himself.

Upon examination, Dr. Koprivica said that claimant had severe deficits in his lumbar flexion and extension. Dr. Koprivica believed that claimant had "permanent aggravating injury from the exposure that he had at work that led to the increase in pain and contributed to the deficits."[4] Based on the AMA *Guides*, Dr. Koprivica placed claimant in DRE Category II for a 5 percent permanent partial impairment to the body as a whole. Dr. Koprivica opined that claimant had a 5 percent permanent partial impairment that predated his injury at respondent and now has an additional 5 percent.

In reference to claimant's previous accidents while working for respondent in 2004 and 2005, Dr. Koprivica opined that those were temporary situations and claimant recovered from his injuries back to his underlying condition.

Dr. Koprivica believes that claimant should avoid frequent or constant lifting or carrying. For occasional lifting or carrying, he would recommend a weight limit of 20 pounds. He should not lift from the floor. He should have postural allowances. Captive sitting should be limited to 30 minutes, and he should have flexibility to get up more frequently if necessary. Standing and walking should be limited to intervals of 15 to 30 minutes with the allowance of sitting if necessary. He also restricted claimant from squatting, crawling, kneeling or climbing. Dr. Koprivica said that without claimant's aggravation at work, he would not have required the restrictions, but his preexisting condition also contributed to the restrictions as well. Dr. Koprivica agreed that of all the doctors who have examined claimant in this case, he is the only one who recommended restrictions.

Dr. Koprivica reviewed the task list prepared by Mary Titterington. Of the 13 job tasks on that list, Dr. Koprivica opined that claimant can no longer perform 11 for an 85 percent task loss. He also reviewed the task list prepared by Terry Cordray. Of the 16 job tasks on Mr. Cordray's list, he believed that claimant would be unable to perform 12 for a

[4] Koprivica Depo. at 13.

75 percent task loss. It is Dr. Koprivica's opinion that claimant would not be able to successfully return to work in the open labor market, saying that claimant had postural limitations and it would be unrealistic to believe an ordinary employer would accommodate them. Dr. Koprivica did not believe claimant could perform the work of a cashier, telemarketer or hotel desk clerk because he needs postural allowances. Dr. Koprivica agreed with Dr. Ebelke that truck drivers are known to be susceptible to back injuries, stating that whole body vibration is a concern because of the biomechanical stresses it puts on the disk in the spine.

Mary Titterington, a vocational rehabilitation counselor, performed a vocational evaluation on claimant on December 15, 2007, at the request of his attorney. They compiled a list of 13 job tasks that claimant performed in the 15 years before injury. Included in these job tasks were those he performed when he worked as a welder at Vulcraft.

Claimant was not working when he came to see Ms. Titterington. He was on a full disability through the Veterans Administration for diabetes mellitus that was related to exposure to Agent Orange when he served in Vietnam in the Army. Ms. Titterington believed that claimant wanted to return to work. However, he did not know what he could do or whether he could sustain it. At the time Ms. Titterington saw him, he had not looked for work and said he did not understand that he should be seeking employment. He told her that he thought respondent was attempting to locate an accommodated position for him.

Ms. Titterington believed that based on Dr. Koprivica's restrictions, claimant would be unable to return to his previous type of work as he would not be able to tolerate the sustained pattern of sitting and the lifting and awkward body positions required. She opined that Dr. Koprivica's restrictions take claimant out of the work force, when combined with his background and lack of a high school diploma. Dr. Koprivica put him in a sit/stand option for jobs, and there are a few of those jobs but not within claimant's academic background. Those types of jobs that are unskilled are jobs such as security monitor, gate attendant, information clerk or general office clerk, all of which require a high school diploma. Ms. Titterington opined: "At the present, [claimant] is experiencing a 100% wage loss. It is most probable that he is unemployable given the extensive nature of his impairments and restrictions."[5]

Terry Cordray, a vocational rehabilitation counselor, performed a vocational evaluation of claimant on June 2, 2008, at the request of respondent. He compiled a list of 16 tasks that claimant had performed in the 15-year period before his injury. As with Ms. Titterington, Mr. Cordray's task list includes tasks claimant performed while working as a welder for Vulcraft.

[5] Titterington Depo., Cl. Ex. 2 at 9.

Claimant told Mr. Cordray that he dropped out of high school in his senior year. He took the GED test in the military but never found out if he passed it and assumes he did not. He has a Class A commercial driver's license. He was trained in the Army in automotive maintenance. He was in the infantry in Vietnam and is 100 percent disabled through the VA for his diabetes. He has applied for a Social Security disability. He has not contacted the state employment office, nor has he applied for any jobs. He has not requested any vocational rehabilitation assistance. He is an insulin dependent diabetic. Because of that, he could not pass a DOT physical to be an over-the-road Class A commercial truck driver. Mr. Cordray did not know if claimant would have been able to continue with his job at respondent after becoming insulin dependent.

Mr. Cordray believed claimant would be able to earn $9 per hour in a job as a cashier, telemarketer or hotel desk clerk in the metropolitan Kansas City area. Claimant's history as a truck driver would be valuable in getting a job as a trucking dispatcher, which pays up to $17.39 per hour. Light or delivery service drivers drive a straight axle truck and do not require more than a Class B CDL, which would not be affected by claimant's insulin-dependent diabetes. Mr. Cordray opined that in the Kansas City area, there is no place that could not be driven in 30 minutes. The median wage for a light delivery person is $11.97. A telemarketer job would only have to have data entry skills or basic keyboarding skills. Claimant does not have these skills and would have to learn them. A hotel desk clerk job would require a high school diploma or GED. Cashiers and telemarketers would not.

Mr. Cordray said that claimant is employable. He opined that claimant would be able to make somewhere between $9 and $12 per hour, even considering the restrictions of Dr. Koprivica. He said that no other doctor provided claimant with restrictions, and with no restrictions, there is no wage loss.

Verland "Terry" Robinson is an executive with respondent. He testified that claimant was hired as a local driver and helped out wherever he was needed. When claimant was hired, he was given regular duty work with no accommodations, and he was able to perform those duties on a regular basis. The majority of his trips were within a 30-mile radius. Approximately 60 percent of the time, claimant drove either a straight truck or a van, and only 40 percent of the time did he drive a tractor trailer. Also, about 90 percent of claimant's loads were no-touch loads. The other 10 percent claimant would sometimes have to unload using either a forklift or a pallet jack. Mr. Robinson believed that as far as truck driving jobs go, claimant's job was pretty easy. He said that performing hostling duties was not a normal part of claimant's job and that he usually performed that duty only when the normal driver was sick or on vacation.

Mr. Robinson said that on or about May 22, 2006, claimant provided him with a full-duty work release from Dr. Zarr. He told claimant that respondent still had work for him. However, claimant told him that even though the doctor had released him to return to work,

he did not believe he could perform the work. Claimant never contacted Mr. Robinson at any time after that date concerning employment.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

K.S.A. 2008 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under

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[6] K.S.A. 2008 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

> the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[9]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[10] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[11] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[12] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

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[9] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[10] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[11] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[13] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[14]

In *Logsdon*,[15] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
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> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[16] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[17] The test is not whether the accident causes the condition, but whether the accident aggravates or

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[13] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[14] *Id.* at 728.

[15] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[16] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[17] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.[18] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[19]

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Kansas Court of Appeals in *Watson*[20] held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must

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[18] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[19] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[20] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001). But see *Gutierrez v. Dold Foods*, ___ Kan. App. 2d __, __ P.3d __ (No. 99,535 filed January 16, 2009); *Stephens v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, *rev. denied* 286 Kan. ___ (2008); *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

> determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[21]

Despite the clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible, there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland*[22] and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to find appropriate employment.

"The work-disability award provides partial compensation for post-injury wage loss. Even if that wage loss is increased because the employee loses his or her pre-injury job, there is no statutory requirement that the job loss be caused by the injury."[23]

In *Roskilly*,[24] the Kansas Court of Appeals held that the then current version of K.S.A. 44-510e(a) does not preclude an award of work disability after a claimant's loss of employment, even though due to reasons other than his or her injury.

> K.S.A. 44-510e(a) as amended in 1993 is interpreted and applied. An injured worker who demonstrates substantial task loss as a result of a work-related injury may recover work disability benefits after returning to his or her unaccommodated employment but thereafter being terminated for a reason not related to his or her underlying injury or the resulting disability. The statute no longer distinguishes between accommodated employment and unaccommodated employment in determining whether an injured worker is entitled to work disability benefits.[25]

The court went on to state:

> In addition, the 1993 legislative amendment to K.S.A. 44-510e(a) removed from the statute the language "[t]here shall be a presumption that the employee has no work disability *if*" the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the

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[21] *Watson,* at Syl. ¶ 4.

[22] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

[23] *Stephens v. Phillips County*, 38 Kan. App. 2d 988, Syl. ¶ 2, 38 Kan. App. 2d 988, 174 P.3d 452, *rev. denied* 286 Kan. ___ (2008).

[24] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

[25] *Id.*, Syl.

> injury, and replaced the same with the language "[a]n employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment *as long as* the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) L. 1993, ch. 286, sec. 34. The language of the statute as amended is plain and unambiguous, leaving no room for judicial construction. See *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003). We hold that on its face K.S.A. 44-510e(a) no longer may be read to make a distinction between accommodated employment and unaccommodated employment when determining an injured worker's right to recover work disability benefits.[26]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[27]

In *Wardlow,*[28] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

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[26] *Id.* at 201.

[27] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[28] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*, held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."[29]

ANALYSIS

The Board finds that claimant's restrictions resulting from his back injury are different and more extensive than his previous restrictions. Claimant's restrictions from his previous low back injury were no lifting greater than 50 pounds, no frequent or continuous bending or twisting, and avoid repetitive stooping, bending and lifting, whereas the restrictions recommended by Dr. Koprivica are to avoid frequent or constant lifting or carrying and occasional lifting or carrying should be limited to 20 pounds with no lifting from the floor. Claimant's captive sitting should be limited to 30 minutes, and he should have flexibility to get up more frequently if necessary. Standing and walking should be limited to intervals of 15 to 30 minutes with the allowance of sitting if necessary. He also restricted claimant from squatting, crawling, kneeling or climbing.

Based upon the two task loss opinions of Dr. Koprivica, the Board finds claimant has lost the ability to perform 80 percent of the work tasks he performed during the 15-year period preceding his accident. This is an average of the 75 percent task loss Dr. Koprivica gave using the task list prepared by Mr. Cordray and the 85 percent opinion using the list prepared by Ms. Titterington. Although there is conflicting evidence concerning when claimant last worked at Vulcraft, it appears probable that claimant worked there during the 15-year period preceding his date of accident with respondent. Furthermore, it makes little difference in the percentage of tasks lost if the tasks claimant performed at Vulcraft are eliminated from the task lists.

Claimant is not permanently totally disabled. Claimant did not return to work for respondent following his release from medical treatment. Although the authorized treating physician did not believe work restrictions were necessary, claimant disagreed and felt he could not return to work doing his same job. It appears that claimant never requested and respondent never offered accommodated work. Nevertheless, after his accident, claimant was capable of returning to work with respondent in an accommodated position that excluded driving the hostling buggy and the tractor trailer in long hauls or interstate travel. Claimant could perform that work with a different delivery service. As such, claimant is capable of earning at least 90 percent of his preinjury average weekly wage.

Moreover, claimant retains the ability to earn even more than what he was earning while working for respondent by working as a dispatcher. Mr. Cordray believed that some of the jobs he described as being within claimant's restrictions would require a high school

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[29] *Id.*

diploma or a GED. Claimant did not graduate from high school. However, he did take the GED examination. Claimant testified that he did not know whether he passed the GED examination. Claimant bears the burden of proof as to his wage loss. Claimant could have found out whether he has a GED. Since claimant took the GED test, the Board will presume he passed and has a GED. Therefore, he is both physically and vocationally capable of working as a dispatcher and earning more than his preinjury average weekly wage.

Claimant has not worked since February 3, 2006, and he has had a 100 percent actual wage loss. However, the Kansas appellate courts have required that before the actual wage loss can be utilized, the factfinder must determine that claimant has made a good faith effort to find employment within his restrictions. If he has not, then a wage must be imputed to claimant based upon his ability to earn wages.[30] Claimant failed to make a good faith job search.

Claimant has not looked for work and, therefore, he obviously has failed to make a good faith effort to find work. He retains the ability to earn 90 percent or more of his gross preinjury average weekly wage of $587.05. This wage will be imputed by operation of law. As such, claimant is deemed to be engaging in work for wages equal to 90 percent or more of the gross average weekly wage he was earning at the time of his injury. Accordingly, claimant's permanent partial disability compensation is limited to his percentage of functional impairment. The Board agrees with the ALJ's finding that claimant has a 5 percent functional impairment, all of which preexisted this accident. Accordingly, claimant is awarded no permanent partial disability compensation.

CONCLUSION

(1) Claimant suffered personal injury to his back by a series of accidents that arose out of and in the course of his employment with respondent.

(2) Claimant did not suffer an intervening accident. The incident that occurred at home on February 4, 2006, was a natural and probable consequence of his work-related injury.

(3) Claimant is not permanently and totally disabled.

(4) Claimant has no additional rateable permanent impairment of function from this injury and, because he failed to make a good faith job search and is capable of earning 90

[30] The Board is mindful of claimant's argument that K.S.A. 44-510e does not require a good faith job search. However, this has been the holding of the Kansas appellate courts for many years and in numerous decisions. Accordingly, if this good faith test is to be changed, the change must come from the appellate courts. Until then, the Board will continue to follow their precedents.

percent or more of his preinjury average weekly wage, he is not entitled to an award of work disability.

(5) Claimant has a 5 percent preexisting impairment and no additional impairment of function per the AMA *Guides* and, therefore, there is nothing against which to apply a credit.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 6, 2008, is modified to find that claimant has no percentage of functional impairment from this accident and is not entitled to a work disability. Therefore, claimant is denied permanent partial disability compensation. The remaining findings, conclusions and orders of the ALJ are affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2009.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority. I believe the greater weight of the evidence establishes that claimant is now totally disabled due to his back injury. The evidence does not establish that respondent had accommodated work that claimant could perform. Likewise, the majority improperly assumes claimant has a GED. In short, based upon his age, education, work experience and injury, claimant is realistically and essentially

unemployable. Accordingly, claimant should be granted permanent, total disability benefits.

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge